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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 806

J. H. PAGE, ET AL,

Petitioners,

v.

PAN AMERICAN PETROLEUM CORPORATION, ET AL.,

Respondents.

~~SUPPLEMENTAL~~ PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, FOR THE FIRST JUDICIAL DISTRICT OF TEXAS, AT HOUSTON

Of Counsel:

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FIDELITY PRINTING COMPANY, INC., HOUSTON

LIST OF AUTHORITIES

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SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, FOR THE FIRST JUDICIAL DISTRICT OF TEXAS, AT HOUSTON

To the Honorable Supreme Court of the United States:

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Court of Civil Appeals for the First Supreme Judicial District of Texas, at Houston.

JURISDICTION

The judgment of the Court of Civil Appeals was rendered February 7th, 1967 motion for re-hearing denied March 16, 1967; and application for writ of error to the Supreme Court of Texas, was overruled July 21, 1967.

The jurisdiction of this Honorable Court is invoked under Seventh amendment to the Constitution of the United States; petitioners having demanded a jury trial, and hav-

ing paid the jury fee; and filing of a counter-acting affidavit of Mae Page Riley, one of the plaintiffs in the suit, swearing that her grandfather, Samuel Harrison Page, who held superior record title to an undivided one-half interest in the 83 acres of land in the Imla Keep league of land in Brazoria County, Texas, involved in this suit.

Section 15, of the Bill of Rights of the Constitution of 1876, of the State of Texas provides: "The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency."

In the appellants' motion for rehearing, and supplemental brief filed in the Supreme Court of Texas, appellants called attention to the affidavit of plaintiff, Mae Page Riley, stating that her grandfather and grandmother were Samuel Harrison Page and Elener Page; that her grandfather died in the year 1893, in Nueces County, Texas; and that she (Mrs. Riley), lived near her grandmother all her life — she died in the year 1912 (see affidavit Mrs. Riley), and that she had numerous conversations about her grandfather, Samuel Harrison Page, and that "my grandmother told me that Samuel Harrison Page never sold the land which he inherited from his mother, Eliza Page Chase, during his lifetime, and said land would belong to the heirs of Samuel Harrison Page after his death. Said affidavit is on page 103 of the Clerk's Transcript."

In the case of *Whitehead* v. *Shattuck*, 11 S. Ct. 276, 138 U.S., 34 L. ed. The Court, in referring to the Seventh Amendment declares that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." "That provision would be defeated if an action at law could be tried by a court of equity, as in the latter court a jury can only be

summoned at its discretion, to ascertain special facts for its enlightment." Citing:

Lewis v. *Cooke,* 90 U.S. 23; Wall. 466, 470 (23: 70, 71);
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Buzard v. *Houston,* 119 U.S. 347, 351 (30:451, 452).

"And so it has been held by this court 'that whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, *the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury.*" Citing: *Hipp* v. *Babin,* 60 U.S.; 19 How. 271, 278 (15: 633, 635).

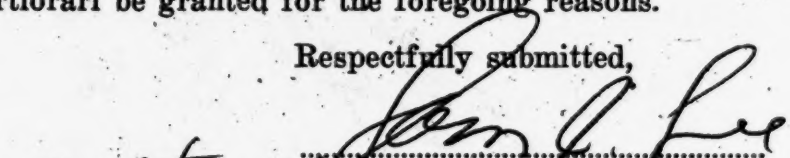
"It would be difficult and perhaps impossible, to state any general rule which would determine in all cases what should be deemed a suit in equity as distinguished from an action at law, for particular elements may enter into consideration which would take the matter from one court to the other; but this may be said, that where an *action is simply for the recovery and possession of specific real property,* including damages for withholding it, has always been of that class. The right which is in this case the plaintiff wishes to assert is his title to certain real property; the remedy which he wishes to obtain is its possession and enjoyment; and in a contest over the title both parties have a constitutional right to call for a jury."

The Supreme Court of the United States has always held, in its decisions, that where a litigant has demanded a jury trial, and paid the fee, and plead the Seventh Amendment of the Constitution of the United States in the State Court will take jurisdiction of the case.

CONCLUSION

Appellants respectfully pray that this petition for a writ of certiorari be granted for the foregoing reasons.

Respectfully submitted,



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APPENDIX "A"

No. B-229

May 31, 1967.

IN THE

SUPREME COURT OF TEXAS

OCTOBER TERM, 1967

J. H. PAGE, ET AL,

v.

PAN AMERICAN PETROLEUM CORPORATION, ET AL.,
FROM BRAZORIA COUNT, FIRST DISTRICT

Application of petitioners for writ of error to the Court of Civil Appeals for the First Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicants, J. H. Page et al., pay all costs incurred on this application.

No. B-229

In The

SUPREME COURT OF TEXAS.

October Term, 1967

J. H. Page, et al.,

v.

Pan American Petroleum Corporation, et al.,
From Brazoria County, First District

Petitioners' motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the .... day of ....., 19.....

/s/ Garson R. Jackson,
Garson R. Jackson, Clerk

APPENDIX "B"

No. 14976

J. H. PAGE, ET AL.,

Appellants,

v.

PAN AMERICAN PETROLEUM CORPORATION, ET AL.,

Appellees.

APPEAL FROM DISTRICT COURT OF BRAZORIA COUNTY

This is an appeal from a summary judgment for the defendant entered in a trespass to try title case. The principal question involved is whether a lost deed can be presumed from the evidence presented as a matter of law.

The land involved in this appeal is an undivided one-half interest in approximately eighty-three acres out of the westerly corner of the upper one-eighth of the Imla Keep League, Brazoria County, Texas.

The Page heirs were plaintiffs in two previous suits involving the title to portions of the upper one-eighth of the Imla Keep League. In Cause No. 38,868 in the District Court of Brazoria County, Texas, reported on appeal as Page v. Pan American Petroleum et al, 327 S.W. 2d 469 (Tex. Civ. App. — Waco, 1959, err. refused nre.), the defendant's motion for summary judgment was sustained on the basis of affidavits establishing adverse possession. In Cause No. 39,056 in the District Court of Brazoria County, Texas, reported on appeal as Page v. Pan American Petroleum Corporation et al, 381 S.W. 2d 949 (Tex. Civ. App. — Corpus Christi, 1964, error refused n.r.e.), the defendant's motion for summary judgment was sustained on the basis of a presumed grant.

The particular tract of land involved in this suit was the subject of a prior suit out of the District Court of Brazoria County, Texas, reported on appeal as Bernard River Land Development Company v. Sweeny, 216 S.W. 2d 597 (Tex. Civ. App. — Galveston, 1948, error refused n.r.e.). The plaintiffs in this suit were not parties to that cause where the record title holders recovered judgment in the face of pleas of presumed grant and limitations.

The entire record in each of these suits was presented to, and considered by, the trial court. The record is voluminous. In 1824 Imla Keep was granted a league of land in Austin's Colony. Anthony Clark and his sister, Elizabeth Chase, together with her two sons, resided in Austin's Colony. In 1829 Elizabeth acquired the upper eighth of the Keep League. Both Anthony and Elizabeth died in 1833, and Elizabeth's two sons, Joseph William Page and Samuel Harrison Page, survived. Joseph William qualified as administrator of his mother's estate and guardian of the estate of his minor brother, Samuel Harrison Page, in 1833. Appraisers were appointed in 1835 and the appraisal filed listed "One-eighth of a League of land, situate, lying and on Bernard." Joseph William filed accounts for the years 1834, 1835, 1836 and 1837, but no further proceedings in the estates are recorded.

In 1839 Joseph William Page by an instrument reciting a consideration of One Dollar and "other good causes and considerations" "granted, bargained, sold, and quitclaimed" unto John Sweeny, his heirs and assigns, "all my right, title, interest, and claim in and to that certain piece of land situate and lying in the County of Brazoria on the west side of the River San Barnard, viz the upper eighth of the upper quarter of League of land granted to Keep by the Mexican Government joining the McCormick League. To have and to

hold the same in fee simple forever. He, the said Joseph W. Page relinquishing for himself and his heirs the whole of said land in favor of the said John Sweeny . . ."

In 1839 Samuel Harrison Page was at least seventeen years of age since he secured a land certificate in his own right in that year. He purchased land in Matagorda County in 1842, and another tract in the same county in 1849. He sold his home in Matagorda County in 1856, but this tract was reconveyed to him in 1858 by a deed in which his residence was recited as Cameron County. In August, 1858, this tract was again conveyed by Harrison Page, the acknowledgement being taken in Nueces County. In 1860 a tract of land in Nueces County was conveyed to Eleanor Page, the wife of Samuel H. Page. Joseph W. Page died in Matagorda County in 1854. Samuel H. Page inherited 4320 acres of land from his brother. Matagorda County adjoined Brazoria County. Apparently Samuel H. Page lived near the land in controversy until 1858 and was a large land owner with lands in several counties. He died in Nueces County in 1893.

In 1836 John Sweeny purchased from William J. Russell one-eighth of a League of land known as the lower half of the upper quarter of the League of land granted to Imla Keep by the Mexican Government. The same year he purchased approximately 1666 acres of land out of the Charles Breen League. The Keep and the Breen Leagues were adjoining grants. John Sweeny and his wife had seven sons and two daughters. He owned many slaves and established a great plantation on these lands. In 1853 John Sweeny conveyed to his daughter, Sophia McGrew, one-half of the upper quarter of the Imla Keep League. John Sweeny died In 1855, his wife having predeceased him. In December, 1855, the children of John Sweeny partitioned the lands which they had inherited from their father and mother. By

this deed Sophia McGrew's title to the land previously deeded to her by her father was confirmed, and specific tracts of land were set off to certain others of the children. The plantation tract, described as the home plantation of John Sweeny, consisting of 550 acres out of the Breen League and 545 acres out of the Imla Keep League, was conveyed in trust to John Sweeny, Jr., who was to sell the land and divide the proceeds. By various conveyances Thomas Sweeny and Sophia McGrew acquired the interests of the other children in the home Plantation. Sophia McGrew lived on the home Plantation. In Bernard River Land Development Company v. Sweeny, supra, the Thomas Sweeny heirs were adjudged owners of the 83 acre tract at issue as against the claims of the assigns of Sophia McGrew. There was evidence in that case that this land was thickly wooded open range. Apparently neither the Thomas Sweeny heirs nor the heirs and assigns of Sophia McGrew used this land prior to 1909, but since that time it has been enclosed with other lands for brief periods and used for pasturing cattle by those claiming under the McGrew title. There was no evidence that the heirs of Thomas Sweeny made any use of this tract of land prior to the conclusion of the Bernard River Land Development Company v. Sweeny case in 1948.

There was extensive, notorious, and continuous use made of other portions of the upper eighth of the Keep League from 1839 to the present time. It was included in the John Sweeny Home Plantation; thereafter, most of it was included in the McGrew plantation for forty years; most of it, except this particular 83 acres, has been sold and resold; large areas have been included in residential subdivisions; and most of the area is within the bounds of the Old Ocean Oil Field.

It appears that Samuel Harrison Page lived within a few miles of this land until 1856 or 1857 and within some 200

miles thereof until his death. He was living nearby when John Sweeny gave part of the tract to his daughter, Sophia, in 1853, and he was still there after John Sweeny died and his heirs partitioned the entire upper eighth of the Keep League. He inherited a great acreage of land from his brother and acquired other lands. He was active in buying and selling land. He lived with his brother for some seventeen years after the death of his mother. He was seventeen years of age and already acquiring land in his own right when John Sweeny purchased his brother's interest in the Imla Keep League. It would be unreasonable to suppose that he was unaware of the lands owned by his mother, which he had inherited from her. It would also be unreasonable to suppose that he did not know of the use being made of these lands by John Sweeny.

John Sweeny and Samuel H. Page were cotenants after Sweeny acquired the interest of Joseph W. Page, since there is no direct proof that Sweeny had acquired any ownership in the property prior to that time. The listing of the Keep League property in the inventory of the Estate of Elizabeth Chase by Joseph Page and the appraisers, together with the fact that John Sweeny purchased Joseph's interest in the land, are facts which would prevent a presumption of a grant to Sweeny from Elizabeth Chase in a summary judgment proceeding. As a general rule the possession of land by a cotenant will be presumed to be in his right as a cotenant and thus not adverse to the claim of ownership by his cotenant. Condra v. Grogan Mfg. Co., 233 S.W. 2d 565 (Tex. Sup. 1950).

In Magee v. Paul, 110 Tex. 470, 221 S.W. 254 (1920), the Court said:

> ". . . the rule is sound which permits the inference that an apparent owner has parted with his title from

evidence, first, of a long-asserted and open claim, adverse to that of the apparent owner; second of non-claim by the apparent owner; and third, of acquiescence by the apparent owner in the adverse claim.

"The rule is essential to the ascertainment of the very truth of ancient transactions."

In Price v. Humble Oil and Refining Co., 152 S.W. 2d 804, (Tex. Civ. App. — Dallas, 1941, writ ref., w.m.), the court relied on the case of Simmons v. Hewitt, 87 S.W. 188 (Court of Civil Appeals of Texas 1905, writ ref.), quoting therefrom the following:

"Appellant further contends, however, that the existence of a deed can never be taken as established by circumstantial evidence alone, in the absence of proof of some sort of possession, and that in this case proof of possession of some of the subdivisions included in the asserted deed will not be enteded by construction to other distinct subdivisions not included in that possession. We cannot indorse the proposition. While is it true that the courts require an assertion of ownership coupled with some sort of possession, the principle is not analogous to possession under limitation. The idea is that there must be a distinct assertion of ownership under the alleged deed, to show that the party asserting its existence acted under it in a substantial and open way, and one which, if unauthorized, would, in the nature of things, have provoked a protest from the owner. It was therefore enough to show, in addition to the other circumstances, that the defendant took possession of part of the land included in the conveyance, and asserted ownership of the whole in himself."

In Republic Production Co. v. Lee, 121 S.W. 2d 973 (Tex. App., 1938, opinion adopted), the Court said:

"It has long been settled in Texas that a conveyance by one cotenant to a stranger, or by one or more coten-

> ants to another cotenant, purporting to convey the entire common property, when followed by actual adverse possession, amounts to a disseizin of the nonparticipating cotenant, and record of such conveyance, followed by possession, constitutes notice of the repudiation. [citing cases] There is no reason whatever why a series of deeds which taken together purport to convey all of the common estate, followed by adverse possession, should not be given the same effect. . . ."

It is apparent, therefore, that Samuel Harrison Page had canstructive notice of the adverse claim of the Sweeny heirs to his interest in the Keep League as a matter of law. The undisputed evidence of a long asserted and open claim to this entire tract on the part of John Sweeny and his heirs, known to Samuel Harrison Page, together with the absence of evidence of any assertion of ownership in himself, leads inevitably to the conclusion of acquiescence in that claim on the part of Page. The evidence is clearly sufficient to sustain a finding of fact of an unrecorded conveyance from Samuel Harrison Page to either John Sweeny, Thomas Sweeny, or Sophia McGrew. Masterson v. Harris County Houston Ship Channel Navigation District, 15 S.W. 2d 1011 (Tex. Comm. App., 1929).

The fact that appellees and those under whom they claim may not have made such use of this particular tract of land as would be necessary to sustain a claim of title by adverse possession under the limitation statutes is not material. In all material respects the facts in this case are identical with those before the Court in Page v. Pan American Petroleum Corporation, 381 S.W. 2d 949 (Tex. Civ. App. — Corpus Christi, 1964). We agree with that Court that the record "presents a situation where, in the total absence of any facts to the contrary, reasonable minds could reach no other conclusion but that the long continued and undisturbed possession and claims of title, acquiesced in by plaintiffs' ances-

tor from whom they claim for over fifty years and by his descendants for another sixty years, could be explained only by the presumption of an unrecorded conveyance. . . ." Faced with such a record, the Court will presume such a conveyance as a matter of law.

The judgment of the Trial Court is affirmed.

/s/ TOM F. COLEMAN
Associate Justice

Judgment rendered and opinion filed February 7, 1967.

THE STATE OF TEXAS }
COUNTY OF HARRIS }

I, ROLA HAMM, Clerk of the Court of Civil Appeals, First Supreme Judicial District of Texas, at Houston, do hereby certify that the preceding 6 pages contain a true and correct copy of said Court's opinion, filed February 9, 1967, in Cause No. 14976, J. H. PAGE ET AL, *Appellants*, vs. PAN AMERICAN PETROLEUM CORPORATION ET AL, *Appellees*, from Brazoria County, and now on file in my office.

TO CERTIFY WHICH, I hereunto set my hand and affix the Seal of said Court, at Houston, this the 5 day of October, A.D. 1967.

[SEAL]

/s/ ROLA HAMM, *Clerk*

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Appellees.

BRIEF FOR APPELLANTS

Attorney for Appellants

Of Counsel:

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FIDELITY PRINTING COMPANY, INC., HOUSTON

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OCTOBER TERM, 1967

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Appellants,

v.

PAN AMERICAN PETROLEUM CORPORATION, ET AL,

Appellees.

BRIEF FOR APPELLANTS

To the Honorable Supreme Court of the United States:

On or about the 1st day of February, 1958, J. H. Page, and the other heirs of Samuel Harrison Page, deceased, record title owners of an undivided one-half interest in a tract of 83 acres of land in the Imla Keep League of 1 and in Brazoria County, Texas, filed suit No. 38693 in the District Court of Brazoria County, Texas, to recover title and possession of their one-half interest in the said 83 acres; process was promptly issued and served on all of the defendants; and the defendants, after first filing answers appropriate in suits in trespass to try title, viz, general denial, pleas of not guilty, and then followed with a motion for summary judgment. Appellants demanded a jury, and paid the requisite jury fee shortly after filing the suit, and long before the motion for summary judgment was filed by the appellees.

The Trial Court granted summary judgment to appellees under the Texas Civil Procedure Rule 166A February 7, 1967; motion for rehearing denied July 21, 1967. Appellants perfected appeal to the Court of Civil Appeals, First Supreme District of Texas, at Houston, and said Summary Judgment affirmed. Reported in Vol. 412, page 797, Southwestern Reporter, 2nd series.

The Supreme Court of Texas refused writ of error, without opinion. A copy of the action of the Supreme Court is on file in the record heretofore filed in this Honorable Court. Motions for re-hearing were overruled by the Supreme Court of Texas, as disclosed by the Record now on file in Clerk's office of the United States Supreme Court.

When the State Trial Court, in its construction of Rule 165-A, of the Texas Rules of Civil Procedure which provides for a Summary Judgment, without disposing of the fact issues raised, are litigants deprived of their property without due process of law, and said summary judgment rendered in this case is contrary to and in violation of the Seventh Amendment of the Constitution of the United States, which provides that "In suits at common law, where the value in controversy shall exceed Twenty Dollars, the right of trial by Jury shall be preserved; and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, then according to the rules of Common Law."

The summary judgment rendered in this case violates "Article VI (second clause) of the Constitution, and of the laws of the United States which shall be made in pursuance thereof * * * and the laws of the United States made or which shall be made under the authority of the United States, shall be the Supreme Law of the land; and the Judges in every state shall be bound thereby, anything in

the constitution or laws of any state to the contrary notwithstanding."

Section 15, of the Bill of Rights of the Constitution of 1876, of the State of Texas provides: "The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency."

In the appellants' motion for rehearing, and supplemental brief filed in the Supreme Court of Texas, appellants called attention to the affidavit of plaintiff, Mae Page Riley, stating that her grandfather and grandmother were Samuel Harrison Page and Elener Page; that her grandfather died in the year 1893, in Nueces County, Texas; and that she (Mrs. Riley), lived near her grandmother all her life — she died in the year 1912 (see affidavit Mrs. Riley, page 103 transcript), and that she had numerous conversations about her grandfather, Samuel Harrison Page, and that "my grandmother told me that Samuel Harrison Page never sold the land which he inherited from his mother, Eliza Page Chase, during his lifetime, and said land would belong to the heirs of Samuel Harrison Page after his death. Said affidavit is on page 103 of the Clerk's Transcript.

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"It would be difficult and perhaps impossible, to state any general rule which would determine in all cases what should be deemed a suit in equity as distinguished from an action at law, for particular elements may enter into consideration which would take the matter from one court to the other; but this may be said, that where an *action is simply for the recovery and possession of specific real property,* including damages for withholding it, has always been of that class. The right which is in this case the plaintiff wishes to assert is his title to certain real property; the remedy which he wishes to obtain is its possession and enjoyment; and in a contest over the title both parties have a constitutional right to call for a jury."

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CONCLUSION

Appellants respectfully pray that this petition for a writ of certiorari be granted for the foregoing reasons.

Respectfully submitted,

Attorney for Appellants

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Of Counsel:

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